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Soha Beta v Public Prosecutor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS Q-05(M)-124–02 OF 2018 AND Q-05(LB)-125–02 OF 2018
ZALEHA YUSOF, RHODZARIAH BUJANG AND HANIPAH FARIKULLAH JJCA
28 JANUARY 2020

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Evidence — Circumstantial evidence — Murder — Security guard saw male accused accompanied by woman carrying a baby entering some bushes — Minutes after they left guard found new-born child buried at scene — Guard positively identified male accused both at police identification parade and at trial but could not identify the woman — Whether the identification evidence coupled with all other pieces of evidence led to irresistible inference that the woman who was carrying the baby was the female co-accused — Whether prosecution had established beyond reasonable doubt that both accused had common intention to kill the baby — Whether defence of both accused was mere denial insufficient to raise any reasonable doubt on the prosecution's case

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The appellant in the first appeal ('Soha Beta') was the brother-in-law of the respondent ('Herna Molla') in the second appeal. The two ('the accused') were lovers and worked in an oil palm plantation ('the plantation'). Their relationship produced an unwanted baby whose murder they were jointly charged with. The prosecution's evidence relied largely on the testimony of a security guard ('PW13') employed by the plantation who, one afternoon, saw Soha Beta entering some bushes at the plantation with a woman (whom he could not identify) who was carrying a baby in a 'kain sarong batik'. According to PW13, when the couple left about ten minutes later, he noticed that the woman's 'kain sarong batik' was empty. He then heard the cries of a baby and when he went to investigate, found a new-born child buried at the scene. Following police investigations, both accused were arrested. According to the prosecution's evidence, Soha Beta had resisted arrest and tried to escape. Police found the baby's DNA on clothing belonging to both accused. PW13 identified Soha Beta at a police identification parade and also at the trial. It was established at the trial that both accused were the baby's biological parents; that Herna Molla had delivered the child at the government hospital in Miri and that the baby was found wrapped in two pieces of cloth bearing the words 'UNTUK KEGUNAAN HOSPITAL SAHAJA'. The pathologist who testified at the trial said that the baby died of asphyxia and that the death would have been instantaneous upon burial. It was this fact that made the trial judge initially acquit and discharge both accused after the prosecution's case because the judge ruled that it was not possible for PW13 to have heard the baby cry after he was buried and that the child most likely must have been dead before

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the burial. On the prosecution's appeal, the Court of Appeal reversed the trial court's decision, found that a prima facie case had been proven against both accused and ordered their defences to be called. The common defence of both accused was that while they were returning to the plantation by bus after Herna Molla's discharge from hospital, they had stopped at a village where Soha Beta gave away the baby to an Indonesian couple. Both accused gave notice of alibi to say that they were in a bus from Miri to Bintulu at the time the offence was committed but gave no further details to enable their alibi to be verified. Based, inter alia, on PW13's positive identification of Soha Beta and the fact that he was the last person to have been seen with the baby, the trial judge rejected the defence's narrative and found that the murder charge had been proven against Soha Beta beyond reasonable doubt. Herna Molla was, however, acquitted and discharged as the trial judge found that there was no evidence to establish that she was the woman who was with Soha Beta at the scene of the crime and the prosecution had also failed to prove common intention on her part to commit the murder. Soha Beta appealed against his conviction and sentence whilst the prosecution appealed against Herna Molla's acquittal and discharge.

Held, unanimously dismissing Soha Beta's appeal and affirming his conviction and sentence; allowing the prosecution's appeal and convicting and sentencing Herna Molla to death on the murder charge:

(1) Soha Beta's complaint that the police identification parade was defective was an issue that was raised before the previous panel of the Court of Appeal ('COA') which decided that a prima facie case had been made out against both accused and ordered their defences to be called. It was not open to the instant panel of the COA to reconsider issues that had been ventilated before. Nevertheless, even if there were defects in the conduct of the identification parade, it had no impact on the finding of guilt against Soha Beta because that evidence merely corroborated PW13's identification of the accused in court. The dock identification was reliable evidence because PW13 could even remember the clothes that Soha Beta wore at the material time and he was honest enough to admit that he could not identify Herna Molla. This showed that PW13 had no ulterior motive to implicate Soha Beta of the crime (see para 18).

(2) Soha Beta did not identify the person(s) to whom he had given away the baby. This defied logic because the baby was Soha Beta's own son and not just a worthless object that he could simply not be bothered about the identity of the receiver. The alleged adoption was never put to any of the prosecution's witnesses, particularly PW18 (the investigating officer), rendering that defence not just an afterthought but a mere denial which was unworthy of credit and which evidentially failed to create a reasonable doubt on the prosecution's case (see para 20).

(3) The notice of alibi put up by both accused was worthless. The alibi defence could not prevail over the positive identification of Soha Beta by PW13 who was a credible witness and had no ill-motive to testify against the accused. The positive identification negated Soha Beta's defence that he had nothing to do with the murder. Equally pertinent was the fact that Soha Beta had behaved aggressively and tried to escape when he was being arrested. This evidence, relevant under s 8 of the Evidence Act 1950, militated against Soha Beta's claim of innocence (see para 21).

(4) Although PW13 could not identify Herna Molla, the sequence of events showed that both accused were together from the time she was discharged from hospital with the baby and they boarded the bus together to go to Simpang Ngu. From the court's analysis of the evidence and application of the law, the only irresistible inference, following the positive identification of Soha Beta by PW13 and his evidence that there was a woman with him carrying a baby when they went into the bushes where the baby was later found buried, was that that woman could only have been Herna Molla and no other. That evidence might be circumstantial, but it was incapable of any other inference favourable to her. Such evidence was sufficient to establish beyond reasonable doubt that both accused had a common intention to cause the baby's death. The statements of the accused from the dock were just mere denials which did not amount to a credible defence (see paras 22–23).

(5) Both accused were the last persons to have been seen with the baby. For Soha Beta, this was borne out by PW13's evidence. This had to equally be the case for Herna Molla for if it was not, this court would not have ordered their defences to be called. That being the case, the burden of proof shifted to the accused 'to explain how the incident had occurred' and the failure to furnish any explanation would give rise to a very strong presumption against the accused. In this regard, neither of the accused proffered any acceptable explanation. Although absence of motive was an important element to look out for when the prosecution relied upon circumstantial evidence to convict, it was not an absolute must in the sense that its absence would exculpate the accused (see paras 25–26).

[Bahasa Malaysia summary

Perayu dalam rayuan pertama ('Soha Beta') adalah abang ipar responden ('Hena Molla') dalam rayuan kedua. Mereka berdua ('tertuduh') adalah kekasih dan bekerja di ladang kelapa sawit ('ladang tersebut'). Hubungan mereka telah menghasilkan bayi yang tidak diingini dan mereka telah dituduh bersama kerana pembunuhannya. Keterangan pendakwaan amat bergantung kepada keterangan pengawal keselamatan ('PW13') yang bekerja dengan lading tersebut yang mana, pada suatu tengah hari, telah melihat Soha Beta memasuki semak di lading tersebut dengan seorang wanita (yang dia tidak dapat kenal pasti) yang mendukung bayi dalam kain sarong batik. Menurut PW13, apabila

pasangan itu meninggalkan tempat itu lebih kurang sepuluh minit kemudian, dia melihat bahawa kain sarong batik wanita itu kosong. Dia kemudian mendengar tangisan bayi dan apabila dia pergi menyiasat, dia menjumpai bayi baru lahir yang telah ditanam di tempat kejadian. Berikutan siasatan polis, kedua-dua tertuduh telah ditangkap. Menurut keterangan pendakwaan, Soha Beta mengelak dari ditangkap dan cuba melepaskan diri. Polis menjumpai DNA bayi pada pakaian milik kedua-dua tertuduh. PW13 mengenal pasti Soha Beta di kawad cam polis dan juga semasa perbicaraan. Ia dibuktikan semasa perbicaraan bahawa kedua-dua tertuduh adalah ibu bapa kandung bayi; bahawa Herna Molla telah melahirkan anak itu di hospital kerajaan di Miri dan bahawa bayi itu telah dijumpai dengan dibalut dalam dua helai kain yang mempunyai perkataan-perkataan 'UNTUK KEGUNAAN HOSPITAL SAHAJA'. Ahli patologi yang memberi keterangan semasa perbicaraan mengatakan bahawa bayi itu meninggal dunia akbat asphyxia dan bahawa kematian itu berlaku sejurus apabila ditanam. Ia adalah fakta ini yang membuat hakim perbicaraan melepas dan membebaskan kedua-dua tertuduh selepas kes pendakwaan kerana hakim memutuskan ia tidak mungkin untuk PW13 mendengar tangisan bayi selepas ia ditanam dan bahawa bayi itu kemungkinan besar telahpun meninggal dunia sebelum ditanam. Atas rayuan pendakwaan, Mahkamah Rayuan mengakas keputusan mahkamah perbicaraan, mendapati kes prima facie telah dibuktikan terhadap kedua-dua tertuduh dan memerintahkan pembelaan mereka dipanggil. Pembelaan sama kedua-dua tertuduh adalah bahawa apabila mereka pulang dari ladang tersebut dengan bas selepas Herna Molla keluar dari hospital, mereka berhenti di kampong di mana Soha Beta telah memberikan bayi itu kepada pasangan Indonesia. Kedua-dua tertuduh telah memberi notis alibi untuk mengatakan bahawa mereka dalam bas dari Miri ke Bintulu pada masa kesalahan itu dilakukan tetapi tidak memberikan butiran selanjutnya bagi membolehkan alibi mereka disahkan. Berdasarkan, antara lain, pengenalan positif PW13 terhadap Soha Beta dan fakta bahawa dia adalah orang terakhir dilihat bersama bayi tersebut, hakim perbicaraan menolak naratif pembelaan dan mendapati bahawa pertuduhan pembunuhan telah dibuktikan terhadap Soha Beta melampaui keraguan munasabah. Herna Molla telah, bagaimanapun, telah dilepas dan dibebaskan kerana hakim perbicaraan mendapati bahawa tiada keterangan untuk membuktikan bahawa dia adalah wanita yang bersama Soha Beta di tempat kejadian jenayah itu dan pendakwaan juga telah gagal membuktikan niat bersama di pihaknya untuk melakukan pembunuhan. Soha Beta telah merayu terhadap sabitan dan hukuman manakala pendakwaan telah merayu terhadap pelepasan dan pembebasan Herna Molla.

Diputuskan, sebulat suara menolak rayuan Soha Beta dan mengesahkan sabitan dan hukuman; membenarkan rayuan pendakwaan dan mensabit dan menjatuhkan hukuman mati ke atas Herna Molla untuk pertuduhan membunuh:

(1) Aduan Soha Beta bahawa kawad cam polis adalah cacat merupakan isu yang ditimbulkan di hadapan panel terdahulu Mahkamah Rayuan ('MR') yang memutuskan bahawa kes prima facie telah dibuktikan terhadap kedua-dua tertuduh dan memerintahkan pembelaan-pembelaan mereka dipanggil. Ia tidak terbuka kepada panel MR ini untuk mengambil kira semula isu-isu yang telah dikemukakan sebelum ini. Walau bagaimanapun, jika terdapat kecacatan dalam pelaksanaan kawad cam itu, ia tiada impak kepada dapatan kebersalahan terhadap Soha Beta kerana keterangan tersebut hanya menyokong pengenalpastian PW13 terhadap tertuduh di mahkamah. Pengenalpastian itu adalah keterangan yang boleh dipercayai kerana PW13 malah boleh ingat pakaian Soha Beta pada masa matan dan dia jujur untuk mengakui yang dia tidak mengenali Herna Molla. Ini menunjukkan bahawa PW13 tiada motif lain untuk menuduh Soha Beta dalam jenayah tersebut (lihat perenggan 18).

(2) Soha Beta tidak mengenal pasti orang yang diberikannya bayi itu. Ini tidak logic kerana bayi itu adalah anak lelakinya sendiri dan bukan objek tidak berharga yang dia boleh tidak menghiraukan pun tentan identiti penerimanya. Pengambilan anak angkat yang dikatakan itu tidak pernah dikemukakan kepada saksi-saksi pendakwaan, terutamanya PW18 (pegawai siasatan), yang menjadikan pembelaan itu bukan sahaja suatu yang telah difikirkan kemudian tetapi penafian semata-mata yang tidak patut dipercayai dan jelas gagal mewujudkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 20).

(3) Notis alibi yang dikemukakan oleh kedua-dua tertuduh tidak boleh digunakan. Alibi pembelaan itu tidak boleh mengatasi pengenalpastian positif Soha Beta oleh PW13 yang merupakan saksi yang boleh dipercayai dan tiada motif jahat untuk memberi keterangan terhadap tertuduh. Pengenalpastian positif itu menidakkan pembelaan Soha Beta bahawa dia tiadak terlibat pun dalam pembunuhan itu. Perkara penting sama adalah fakta yang Soha Beta berkelakuan agresif dan cuba melarikan diri semasa dia ditangkap. Keterangan ini, relevan di bawah s 8 Akta Keterangan 1950, bercanggah dengan dakwaan kejujuran Soha Beta (lihat perenggan 21).

(4) Walaupun PW13 tidak dapat mengenal pasti Herna Molla, siri kejadian menunjukkan bahawa kedua-dua tertuduh bersama dari masa dia keluar dari hospital dengan bayi itu dan mereka menaiki bas bersama untuk pergi ke Simpang Ngu. Daripada analisis mahkamah berhubung keterangan dan pemakaian undang-undang, satu-satunya inferens yang tidak boleh disangkal, berikutan pengenalpastian positif Soha Beta oleh PW13 dan keterangannya bahawa terdapat wanita bersamanya yang mendukung bayi semasa mereka masuk ke dalam semak di mana bayi itu kemudian dijumpai telah ditanam, adalah bahawa wanita itu hanyalah

Herna Molla dan bukan orang lain. Keterangan tersebut mungkin mengikut keadaan, tetapi ia tidak boleh dijadikan inferens lain yang menyebelahinya. Keterangan tersebut adalah mencukupi untuk membuktikan melampaui keraguan munasabah bahawa kedua-dua tertuduh mempunyai niat bersama untuk menyebabkan kematian bayi itu. Kenyataan-kenyataan tersebut dari kandang hanyalah penafian semata-mata yang bukan merupakan pembelaan yang boleh dipercayai (lihat perenggan 22–23).

(5) Kedua-dua tertuduh merupakan orang terakir yang dilihat bersama bayi itu. Untuk Soha Beta, ini berdasarkan keterangan PW13. Ini patut sama dengan kesnya untuk Herna Molla kerana jika tidak, mahkamah ini tidak mungkin tela memerintahkan pembelaan mereka dipanggil. Oleh demikian, beban bukti dipindahkan kepada tertuduh 'to explain how the incident had occurred' dan kegagalan untuk memberi apa-apa penjelasan boleh menimbulkan andaian terhadap tertudh. Dalam hal ini, tertuduh tidak memberikan apa-apa penjelasan yang boleh diterima. Meskipun ketiadaan motif adalah elemen penting untuk ditemui apabila pendakwaan bergantung kepada keterangan mengikut keadaan untuk membuat sabitan, ia bukan perkara wajib sehinggakan ketiadaannya boleh membebaskan tertuduh (lihat perenggan 25–26).]

Cases referred to

Abdul Samid bin Edward v PP [2015] 4 MLJ 58; [2015] 4 CLJ 149, CA (refd)
Ahmad Najib bin Aris v PP [2007] 2 MLJ 505; [2007] 2 CLJ 229, CA (refd)
Ashok v State of Maharashira [2015] 4 SC 393, SC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Chang Kim Seong v PP [1968] 1 MLJ 36, FC (refd)
Chukwudi Hassan lwn Pendakwa Raya [2015] MLJU 847; [2015] 8 CLJ 353, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49, FC (refd)
Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277, FC (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Manimaran a/l Amas v PP and other appeals [2015] 1 MLJ 18, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pathmanabhan a/l Nalliannen v PP and other appeals [2017] 3 MLJ 141; [2017] 4 CLJ 137, FC (refd)
Pendakwa Raya v Nirmala a/p Subramaniam & Ors [2017] MLJU 567; [2017] 1 LNS 537, CA (refd)
PP v Willey Anak Salleh [2017] MLJU 1791, CA (refd)
ST Shind v State of Maharashtra AIR [1974] SC 791, SC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)

Legislation referred to

Evidence Act 1950 s 8
Penal Code ss 302, 318

Appeal from: Criminal Trial No MYY-45B-2/7 of 2014 (High Court, Miri)

Ranbir Singh Sangha (Ranbir S Sangha & Co) in Criminal Appeal No Q-05(M)-124–02 of 2018 for the appellant.
Intan Suraya bt Ismail (Attorney General's Chambers) in Criminal Appeal No Q-05(LB)-125–02 of 2018 for the appellant.
Intan Suraya bt Ismail (Attorney General's Chambers) in Criminal Appeal No Q-05(M)-124–02 of 2018 for the respondent.
Ranbir Singh Sangha (Ranbir S Sangha & Co) in Criminal Appeal No Q-05(LB)-125–02 of 2018 for the respondent.

Rhodzariah Bujang JCA:

[1] The appellant in the first appeal and the respondent in the second appeal listed above were lovers and are related by marriage for the said respondent was the appellant's sister-in-law. Both are Indonesian nationals and were charged in the High Court of Miri with the murder of their biological child who was barely three days old at the alleged time of the incident. The learned judicial commissioner ('JC') as His Lordship then was, discharged and acquitted both of them without their defence being called but on appeal by the prosecution, that decision was reversed by this court and His Lordship was directed to hear their respective defences to the said charge. Having done so, the learned JC convicted the appellant and acquitted the respondent. Hence, the two appeals before us which we heard on the 21 October 2019 wherein at the conclusion of their joint hearing, we affirmed the aforesaid order of conviction but reversed that on the acquittal. In our grounds of judgment below the said appellant would be referred to as the first accused, the said respondent as the second accused and the deceased as the baby. We would start by first reproducing the charge against the two accused.

THE CHARGE

[2] 'Bahawa kamu, bersama-sama, pada 26.11.2013, jam lebih kurang 3.30 petang, bertempat di lereng bukit, Jalan Ladang Alamwasa Sdn Bhd Suai, Batu Niah, di dalam daerah Miri, dalam Negeri Sarawak, didapati dengan niat bersama melakukan pembunuhan dengan penyebabkan kematian ke atas seorang bayi lelaki (tiada nama) umur lebih kurang 2 hari, oleh yang demikian, kamu telah melakukan satu kesalahan dibawah Seksyen 302 Kanun keseksaan dan dibaca bersama dengan Seksyen 34 Kanun yang sama'.

THE PROSECUTION'S CASE

[3] The undisputed facts adduced by the prosecution against the two accused are these:

(a) the second accused gave birth to the baby at 5.05pm on the 23 November 2013 in Miri Hospital and both the second accused and the baby were discharged the following day from the said hospital, hale and healthy;

(b) the first accused was the biological father of the baby;

(c) that the body of the baby was found buried in the place as stated in the charge by one Titus Farneubun ('PW13') at 3.30pm on 26 November 2013. PW13 was at that material time, a security guard in the oil palm plantation belonging to Alamwasa Plantation Sdn Bhd where the baby was buried;

(d) the baby was wrapped with two pieces of cloth with the words 'UNTUK KEGUNAAN HOSPITAL SAHAJA' on them;

(e) the baby's cause of death was asphyxia according to the pathologist, Dr Jamil bin Dolkadir ('PW19') which he said could be caused by burying the baby alive and that such act was sufficient in the ordinary course of nature to cause death to the baby; and

(f) both the accused were arrested at Ladang Sungai Pandan 4, Bintulu on 2 December 2013 at 1.30pm.

[4] In order to prove that it was the two accused who, acting in furtherance of their common intention, asphyxiated the baby, the prosecution relied purely on circumstantial evidence and that evidence rests largely with PW13 who testified that on 26 November 2013 at about 3.30pm he saw a man entering the bushes at the plantation and whom he identified as the first accused at an identification parade held on 25 December 2013, which was just nine days after that as well as in court on 5 September 2015. The first accused, said PW13 was at that material time with a woman whom he could not identify for she was looking down whilst carrying a baby in a 'kain sarong batik'. Upon seeing them leaving about ten minutes later, he said the woman was no longer carrying the baby for the 'kain sarong batik' according to PW13 was empty. After they left, PW13 heard the sound of a baby crying and when he went to investigate, he made the gruesome discovery as stated above. PW13 then informed his manager, Li Chee Kiong ('PW12') about the discovery who then went to the scene and the latter further informed the manager of Regalot Pelita Plantation Sdn Bhd, Musa bin Ismail ('PW11') who in turn alerted the police on the discovery.

[5] Eventually, with the help of Bukit Aman Police Headquarters, the two

accused persons were arrested at the place as stated above. According to the evidence of the arresting officer, Insp Nasrul Hadi bin Jahat ('PW4'), the first accused acted aggressively and tried to escape when the arrest was made. Although in cross-examination it was put to PW4 that he never did behave that way, PW4 maintained his evidence that the first accused did.

[6] Upon their arrests, both the accused's clothings were seized by the police. That mentioned by PW13 as being worn by the first accused, that is a black tshirt (exh P38B) contained not only his DNA but that of the second accused and the baby. Whilst that seized from the second accused, that is a pair of pink short pants (exh P36B) and pink blouse (exh P37B) contained both her DNA and that of the baby.

NO PRIMA FACIE CASE

[7] The learned JC's reason for finding that there was no prima facie case made out against the two accused was because he could not accept PW13's evidence that he heard the cries of the baby about ten minutes after the first accused and the second accused left the scene because the baby would have died instantly upon burial. His Lordship referred to the evidence of PW19 who said that the baby could not have cried once buried. Therefore, said His Lordship, the baby must have already been dead when buried so he directed the learned DPP to frame a charge against both of them under s 318 of the Penal Code. That decision was of course reversed by this court on appeal as mentioned earlier.

[8] Given that earlier decision by this court, we too are bound to accept and was in no position to resile from that already determined by this court that a prima facie case has been made out against the two accused and our task, like that of the learned JC, is only to determine if the respective defences of the two accused had raised any reasonable doubt on the prosecution's case. The statement made by this court, which we fully endorsed, in *Manimaran a/l Amas v Public Prosecutor and other appeals* [2015] 1 MLJ 18 as highlighted by the learned deputy public prosecutor ('DPP') at the hearing of the appeal before us is worth reproducing:

> [25] In the instant appeal, since all the appellants were called upon by the Court of Appeal to enter on their defence, it must necessarily mean that the Court of Appeal was satisfied that the prosecution had proved all the ingredients of the charge, including the element of common intention, before concluding that a prima facie case had been made out by the prosecution. There was therefore no necessity for us to revisit the issues on whether a prima facie case had been made out. What we need to consider was whether the evidence from the defence had cast a reasonable doubt on the prosecution's case.

THE DEFENCES

[9] Both the accused gave unsworn statements and did not call any witness to testify in their defence. In both their statements, they admitted having an affair with each other which led to the birth of the baby. According to the first accused, upon the second accused's discharge from the said Hospital they took a bus back to the oil palm plantation where they worked. They alighted from the bus at a place called Simpang Ngu, Niah where the first accused took the baby from the second accused by force in order to give it up for adoption which move was strongly opposed by the second accused. He left with the baby and when he came back he told her that he had given the baby to an Indonesian couple. They then boarded a bus to go to the place where they were subsequently arrested.

[10] The unsworn statement of the second accused corroborates that of the first accused and needs no repetition. Both accused also tendered a notice of alibi (exhs D1 and D2) to say that they were together in a bus from Miri to Bintulu at the time and date of the offence but no witnesses were listed or named in the said notices. The bus company was similarly not identified in the said notices which prompted us to say straightaway that the said omission has of course whittled away the weight to be given to the said defence given the impossibility of the prosecution to verify the accuracy of the fact as stated in the notices.

FINDINGS OF THE LEARNED JC

[11] In respect of the first accused, the learned JC was of the view that his defence that he gave up the baby to an Indonesian couple for adoption in his unsworn statement should not be given much weight as it was not contained in a caution statement made during investigation, citing this court's decision in *Chukwudi Hassan lwn Pendakwa Raya* [2015] MLJU 847; [2015] 8 CLJ 353. His Lordship remarked that the first accused had also been positively identified by PW13 and was the last person seen with the baby. The alibi notices were rejected as being an afterthought and His Lordship particularly highlighted the fact that he did not even mention the Indonesian couple who allegedly adopted the baby. The learned JC concluded therefore that the first accused's defence failed to raise any reasonable doubt on the prosecution's case. As for the second accused, the learned JC held that she was not the woman seen by PW13 carrying the baby with the first accused because PW13 could not identify her at the identification parade and in court and the prosecution has failed to establish the element of common intention as required in the charge. Thus, His Lordship again discharged and acquitted her of the charge.

A THE APPEAL

[12] Learned counsel for both the accused raised four common issues respecting them and they are:

B (a) existence of a foreign DNA on the cloths found with the baby;

(b) unsatisfactory evidence on the identification parade;

(c) the credibility of the alibi defence; and

C (d) evaluation of the unsworn statements of the accused.

As against the second accused, learned counsel submitted that she had been properly acquitted on account of PW13's failure to identify her and the absence of evidence on common intention as per the charge.

D THE FIRST AND SECOND ISSUES

[13] The evidence on the existence of a foreign DNA, besides that of the first and second accused, found on the green and white cloths (exh P31(b) and E P32(b)) from Miri Hospital which was used to wrap the baby when it was buried, came from the scientific officer, Phoon Voong Keat (PW20) and the investigation officer, ASP Soliment Nyian ('PW18'). This evidence, according to learned counsel corroborates that in the common defence of the two accused that the baby had been given up for adoption by the first accused. With respect, F we are unable to accede to this argument because as stated above, these two pieces of cloths were from Miri Hospital and it stands to reason and it is pure common sense that they had not only been used but also handled by others before the two accused and the baby.

G **[14]** The second issue relates to the defence's complaint that the identification parade conducted was defective. In exh P18, which is the report prepared by PW6 for the identification parade conducted by Insp Nor Rahimah bt Hashim ('PW5') in respect of that conducted for the second accused that involves three Miri Hospital's personnels, that is, Rizal bin Firdaus H ('PW14'), Faridah anak Igok and Marilyn Sahek ('PW15'), it was recorded that the witnesses were informed that they could identify the suspect by touching the suspect's shoulder. However, in exh P19 which is the identification parade report on both accused by PW13 conducted by Insp Huzaimi bin Md Said ('PW6'), the same recording was absent (see pp 116 and 126 of Vol 3 of the I appeal record respectively). As noted in the said exh P19, PW13 did not however identify the first accused by that act but from his position in the line-up.

[15] It was also raised by learned defence counsel that there was an earlier

notation made by PW6 in handwritten form which was then typed in and printed out from the computer which reads as follows:

PEMAKLUMAN KEPUTUSAN PROSEDUR PENGECAMAN

13.1	Samada saspek pertama dimaklumkan tentang keputusan kawat cam	(Ya / *Tidak*)
13.2	Samada saspek kedua (jika ada) dimaklumkan tentang keputusan kawat cam:	(Ya / Tidak)

PW6 admitted that he had in exh P19 forgot to remove the highlight from the word 'Tidak' under item 13.

[16] Four other points of dissatisfaction were raised by him about the said report, to wit, firstly and as alluded to earlier, PW13 identified the first accused by pointing to him but yet in exh P19 it was stated that he was identified from his position number. Secondly, the first accused was not stated in the report to have been informed of his right to have his lawyer present but for the second accused, it was so stated in exh P18. Thirdly, the first accused did not sign on exh P19 to indicate that he did not want a lawyer or friend present. Lastly, the other participants in the identification parade were not of the same race as the first accused, only the same nationality, that is Indonesians and in the absence of their contact numbers, the learned JC would not be in position to compare whether these participants were of similar height, complexion and built as the first accused.

[17] Furthermore, submitted learned counsel, there were also contradictions in the evidence of PW6 and PW13 on, inter alia, when the identification parade was conducted, how many participants were involved (PW13 said more than 20, PW6 said 11) and PW13 saying that first accused was standing at position No 5 whereas the report said he was at position No 7. Learned counsel cited, inter alia, the Federal Court's decision in *Chang Kim Seong v Public Prosecutor* [1968] 1 MLJ 36 which held that where the witness was earlier asked to identify the accused in the police station before the identification parade was conducted, the said evidence was vitiated.

[18] The learned DPP in her oral submission said these issues had been raised before the previous panel and yet it still found that a prima facie case has been made out against the first accused. Learned counsel for the two accused in his oral reply did not refute that this was what happened at that hearing before this court then. As mentioned earlier, it is her submission that we should not revisit these issues but must just focus on the defences raised by the two accused. We were of the like mind as the learned DPP that it was not open to us to reconsider issues which had been ventilated before the previous panel for obviously we were barred from doing so being courts of coordinate

jurisdiction. Nevertheless, even if we were to agree that the identification parade conducted in respect of the first accused was defective and agree that the said evidence be excluded, it would not impact on the finding of guilt against the first accused because the said evidence is merely corroborative of the identification by PW13 in court. This has been stated in *ST Shind v State of Maharashtra AIR* [1974] SC 791 which was quoted by this court in *Pendakwa Raya v Nirmala a/p Subramaniam & Ors* [2017] MLJU 567; [2017] 1 LNS 537. Furthermore, the dock identification by PW13 is to us reliable evidence because as stated earlier he could even remember the clothes worn by the first accused at that material time and was honest enough to admit that he could not identify the second accused. This shows that he had no ulterior motive to implicate the first accused of the crime.

THE REST OF THE ISSUES

[19] Again it is expedient for us to consider not just the third and fourth issues together but also with that against the acquittal of the second accused as all these issues are intertwined. It is of course trite law that although it is the undeniable right of an accused person to give his defence by way of an unsworn evidence which must be considered by the court, the weight to be attached to it is lesser than that of a sworn statement because the accused could not be cross-examined (see for instance, *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145).

[20] Given it was a common stand of both accused that the baby was given up for adoption, the fact that the first accused did not identify the person(s) whom he gave up the baby to during investigation as confirmed by PW18 in his evidence at p 357 Vol 2(2) of the appeal record and even in his defence, defies logic for the baby was his own son after all and not just a worthless object that he could simply not be bothered with the identity of its receiver. We noted too that the alleged adoption was never put to any of the prosecution witnesses, particularly PW18, rendering that common defence of the two accused not just an afterthought but a mere denial which was not worthy of credit and which evidentially has failed to create a reasonable doubt on the prosecution case. This has been held by the Federal Court in *Dato' Seri Anwar bin Ibrahim*'s case.

[21] The positive identification of the first accused by PW13, even if we were to disregard that it was made in the identification parade, negates the defence that he had anything to do with the murder and as held in *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49 an alibi defence could not prevail over the positive identification of an accused person especially in the face of categorical statements coming from credible witnesses who has no ill motives in testifying against the accused. The above consideration bolsters our earlier finding on the worthlessness of the notice of alibi put up by both accused. As for the point

raised by learned counsel that PW13 could not have heard the baby's cries if it had been buried alive as conceded to by the pathologist and that at a distance of 74 meters, PW13 could not have possibly heard such cries, that point cannot be re-ventilated before us after the finding of prima facie case by this court. This we say because from our reading of the first judgment of the learned JC when His Lordship acquitted both of the accused, that was the very reason that was used by him to justify the said acquittals. Equally pertinent to the first accused is the fact that he had behaved aggressively and tried to escape as mentioned earlier in our judgment. That evidence is relevant under s 8 of the Evidence Act 1950 which militates against the claim of innocence by the first accused. The principle to be applied on this point of law is explained by the Federal Court in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 at p 44; [2009] 1 CLJ 717 at pp 746–747 as follows:

> [37] The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satifies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s 9. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v Stephenson* [1904] 68 JP 524). The onus may be discharged even in the course of the case for the prosecution, for example, by way of cross-examination of relevant witnesses. If not so done it can be discharged only at the defence stage.

In his statement, the first accused merely said he surrendered voluntarily (see p 416, Vol 2(3) of the appeal record) but we find no reason to find that PW4 had fabricated his evidence against the first accused.

[22] As for the second accused, although PW13 could not identify her but the sequence of events as per their own defence shows that both the accused were together from the time of the second accused's discharge with the baby from the Miri Hospital and together they had boarded the bus to go to Simpang Ngu. The Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 at p 656 has held, and this we rephrase, that a piece of circumstantial evidence should not be looked at in isolation by the court but together with the others which had been adduced by the prosecution. A quote from Thomson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307 was reproduced by the Federal Court and we would do the same below:

> In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[23] Thus, from our analysis of the evidence and application of the law above, the only irresistible inference to be made following the positive identification of the first accused by PW13 and his evidence that there was a woman with him carrying a baby going into the bushes where the baby was later found buried, that woman could only be the second accused and no other. Circumstantial may that evidence be, but to us, it being incapable of any other inference favourable to the second accused, such evidence was sufficient to establish beyond reasonable doubt that both of the accused had a common intention to cause the death of the baby for their statements from the dock were just a mere denial. Such a denial as we had stated earlier does not amount to a credible defence.

[24] Our conclusion above is made after due consideration of the law, firstly on circumstantial evidence, as stated by this court in *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229 which was quoted with approval by the Federal Court in *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137 at p 185 and is reproduced below:

> In *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229, Abdul Aziz Mohamad JCA (as he then was), delivering the judgment of the Court of Appeal said:
>
> > ... As to what circumstantial evidence is, it is needful to quote only that part of the summing up to the jury that is set out in *Idris v Public Prosecutor* [1960] 1 MLJ 296 at p 297; [1960] 1 LNS 40:
> >
> > > With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven & Stenton Peerage* reported in 1875–6 Appeal Cases, p 279:
> > >
> > > > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
> >
> > In other words circumstantial evidence consists of this: that when you look at

> all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all ...

[25] As was earlier stated by the Federal Court in the same case, citing *Abdul Samid bin Edward v Public Prosecutor* [2015] 4 MLJ 58; [2015] 4 CLJ 149 absence of motive, though an important element to look out for when the prosecution relies on circumstantial evidence to convict an accused, is not an absolute must in the sense that the absence of it would exculpate the accused. It is also worth emphasising that both accused were the last persons seen alive with the baby and for the first accused this is borne out in the evidence of PW13. This must equally be the case for the second accused for if it were not this court would not have ordered their defences to be called. That being the case, as held by this court in *Public Prosecutor v Willey Anak Salleh* [2017] MLJU 1791 quoting from *Ashok v State of Maharashira* [2015] 4 SC 393, viz:

> ... the burden of proof shifts on the accused 'to explain how the incident had occurred' and that failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him.

[26] Although the Federal Court in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 it was held that '... no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen with the deceased, he being no other than her own lover who is naturally expected to be with her', nevertheless in this case, even though no such inference can be drawn but the requirement for the explanation as held in *Ashok*'s case must still be satisfied. From the statements of both accused, no such acceptable explanation had been proffered by them.

[27] Secondly, on the element of common intention, it is, as advised by the Federal Court in *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277, a question of fact to be proved mainly as a matter of inference from the circumstances of the case such as the conduct of the accused and the manner in which the accused arrived at the scene because direct evidence as proof is difficult to procure since common intention is essentially a state of mind. In this case before us, the very same circumstances which we alluded to earlier, especially the togetherness of the two accused is satisfaction of the proof of that essential element of the charge against them.

[28] Accordingly, based on the factual and legal considerations above, we have decided to dismiss the first accused's appeal and to uphold the High Court's conviction and sentence against the first accused. That of the public prosecutor's against the second accused was allowed and for which she was

sentenced by us to the mandatory death penalty, that is, to be hanged by the neck until she is dead under s 302 of the Penal Code.

Order accordingly.

Reported by Ashok Kumar